Hon. J.W. Tsekooko.

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

CRIMINAL APPEAL NO. 1/93

(FROM ORIGINAL SOROTI CRIMINAL CASE NO MS. 211/92)

Stolen Property — Musoke

OMOLO DANIEL DAVID ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE S.G. ENGWAU.

JUDGMENT:

In the Chief Magistrate's court at Soroti, the appellant/accused was charged with Receiving or Retaining stolen property contrary to section 298 (1) of the penal Code Act. He was found guilty of this offence and on 5.1.93 sentenced to 3 years' imprisonment.

The appeal is against both conviction and sentence on the following grounds:-

1. THAT, the learned Chief Magistrate erred in law by failing to inform the appellant of his right at the close of the prosecution case as provided in section 126 (1) M.C.A. 1970.

2. THAT, the learned Chief Magistrate misdirected himself in law and on the facts of the case when he held that the appellant knew that both Ajena and Okeng are habitual thieves and therefore he knew or ought to have known that the property in question were stolen or feloniously obtained.

3. THAT, the sentence of 3 years' imprisonment was harsh in the circumstances of the case.

In the first ground of this appeal, the learned Counsel for the appellant submitted that under section 126 (1) M.C.A., it is mandatory for the trial court to explain the substance of the charge to an accused person at the close of the prosecution case, especially when a prima facie case has been established. In addition, the court has a duty to inform an accused of his right either to adduce evidence on oath in which case he will be subject to cross-examination or give unsworn statement in which case he will not be cross-examined or simply keep mute. It is the right of the accused to call witnesses, if any, for his defence.

It is the contention of the Counsel for appellant that the learned trial Magistrate erred in law by failing to inform the appellant of his statutory rights as stipulated in section 126 (1)

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M.C.A. and in consequence thereof, a miscarriage of justice has been occasioned. However, the learned Counsel for the respondent to the contrary holds the view that according to evidence on record, the learned trial Chief Magistrate complied with the provisions of section 126 (1) M.C.A.

According to evidence on record, at the close of the prosecution case, the learned trial Chief Magistrate, ruled that there was a prima facie case. The appellant/accused is recorded to have said, "I have nothing to say. I wish to call some witnesses". In my humble view, I'm in full agreement with the learned Counsel for the respondent that the trial magistrate complied with the provisions of section 126 (1) M.C.A. In the premises, the first ground of this appeal fails. No miscarriage of justice has been occasioned. The appellant/accused was only informed of his statutory right in accordance with the provisions of section 126 (1) M.C.A.

Turning now to the second ground of this appeal, it is the contention of the learned Counsel for appellant that the prosecution failed to prove the necessary ingredients of section 298 (1) of the penal Code Act beyond reasonable doubt. There is no evidence on record that the appellant knew or ought to have known that the property in question were stolen or feloniously obtained.

On the other hand, however, the learned Counsel for the respondent argued that the prosecution had proved all the ingredients of the offence with which the appellant/accused was convicted. The complainant's shop was broken into and various items stolen which included the items found with the appellant only 2 days after the alleged theft. By buying the alleged stolen items under a tree, the appellant knew or ought to have known that the properties were stolen. Moreover, at his arrest, the appellant readily handed the stolen items to the police.

In his judgment, the learned Chief Magistrate had this to say inter alia:-

> "I have gone through the prosecution evidence and that of the one defence witness. There is overwhelming evidence to prove that the accused received the stolen property from one Ajena but the question is did he know that Ajena had stolen this property ..... From the evidence of the prosecution witnesses the accused knew Ajena and Okeng as habitual thieves. Therefore when he bought the stolen articles he know that they had been stolen or feloniously obtained ....."

According to evidence on record, however, there is overwhelming evidence that the appellant bought the property allegedly stolen from one Ajena but apart from pw4, police officer, who testified that pw1 told him that Ajena and Okeng were ever breaking

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into shops of people at Moruapesur, there is no evidence that the appellant knew that Ajena and Okeng as habitual thieves. Careful scrutiny reveals that evidence of pw4 was nothing short of hearsay which is inadmissible. pw1 testified in court but at no stage did he assert that Ajena and Okeng were ever breaking into shops of people in Moruapesur or that they are habitual thieves. Worse still, there is no evidence on record that the appellant knew Ajena and Okeng as habitual thieves. It was the duty of the prosecution to prove beyond reasonable doubt that the appellant knew or had reason to believe that the property in question was stolen or feloniously obtained. In the instant case, the appellant came to know that property was stolen after he had bought the same. He did not know at the time he bought or received them. I find it not peculiar or forbidden by law to buy any property under any tree. By producing to the police property allegedly stolen only 2 days after the alleged theft by itself is not sufficient evidence to prove that the appellant was, by doctrine of recent possession, either a thief or a guilty receiver. In any case the appellant was not charged with theft.

In conclusion, the learned Chief Magistrate grossly misdirected himself in law and on the facts of this case, the prosecution according to evidence on record, failed to prove beyond reasonable doubt the ingredients set out in section 298 (1) P.C. Act for which the appellant was convicted. In the premises, conviction is hereby quashed. Although, Counsel for respondent conceded that a sentence of 3 years' imprisonment was harsh in the circumstances of this case and suggested one of 6 months' imprisonment, but since the conviction is hereof quashed accordingly the sentence of 3 years' imprisonment is hereof set aside. The appellant is hereof released with immediate effect unless being lawfully held for some other crime

S.G. ENGWAU
JUDGE.
12.2.93.

12.2.93: Appellant in court.
Mr. Kakembo for appellant.
No representative of the respondent.
Judgment delivered in open court.

S.G. ENGWAU
JUDGE
12.2.93.